

STATE OF MICHIGAN
COURT OF APPEALS

IN RE LAFAVE ESTATE.

KATHERINE LAFAVE, Personal Representative
of the Estate of Neal B. LAFAVE, Deceased,

Appellee,

v

DEARBORN FEDERAL CREDIT UNION
FINANCIAL,

Appellant.

UNPUBLISHED
February 13, 2007

No. 264839
Wayne Probate Court
LC No. 2004-679037-DE
Wayne Circuit Court
LC No. 05-514780-AV

Before: Kelly, P.J., and Davis and Servitto, JJ.

PER CURIAM.

Dearborn Federal Credit Union Financial (“DFCU”) appeals by leave granted the probate court order denying its petition for the appointment of a special personal representative; DFCU also appeals the circuit court order denying leave to appeal the probate court’s protective order granted in favor of Katherine LaFave. We affirm.

The decedent, Neal B. LaFave, died unexpectedly of a heart attack on June 14, 2004, at age 56. He was divorced, had three adult children, and was intestate. Petitioner Katherine LaFave (“petitioner”), the decedent’s daughter, was appointed personal representative on July 7, 2004. On July 30, 2004, DFCU filed a claim as a creditor for \$18,077.19, plus interest. Several other creditors also filed claims; the claims against the estate eventually totaled \$50,307.40. On October 25, 2004, petitioner filed an inventory valuing the estate’s net assets at \$22,090.45. She also filed claims for \$10,502.25 for funeral and burial expenses, \$5,215.80 in attorney expenses for the estate, and \$607.20 in fiduciary fees. On September 30, 2004, DFCU petitioned for payment of its claim. Petitioner was deposed on November 4, 2004, where she refused to answer any questions regarding assets other than those identified in the estate inventory, questions about decedent’s asset transfers or trusts, or questions about joint assets. DFCU moved to compel discovery, and petitioner moved for a protective order limiting the scope of discovery. The probate court concluded that no objections to the estate inventory had been filed, and there was no action pending that would permit DFCU’s proposed discovery.

Petitioner filed a petition for adjudication of testacy and complete estate settlement; the schedule of distributions included payment of \$2,093.82 to DFCU. DFCU objected, again asserting that petitioner had refused to answer questions at the deposition and scheduled a second deposition. Petitioner moved for a protective order, and the probate court concluded that DFCU's discovery requests sounded like a fishing expedition designed to use estate money to determine whether there was a potential fraudulent conveyance claim in circuit court, which was prohibited by MCR 5.131. DFCU asserted that petitioner had admitted at the second deposition that she and her siblings had received some transfers, life insurance, and 401(k) plan benefits from the decedent; that decedent's annual income was more than \$100,000; and that petitioner had feigned lack of knowledge of any assets or transfers. DFCU argued that payment of one daughter's credit card bills and tuition and contributions to his life insurance and 401(k) plans during the decedent's lifetime constituted fraudulent transfers. DFCU moved to appoint a special personal representative. Petitioner asserted that any transfers were nominal or Christmas and birthday presents; that although one of her siblings was on one of decedent's accounts, he was not paying her bills; and the tuition payments had been reimbursed by the decedent's employer. She asserted that the decedent had been current on all payments for all of his debts at the time of his death.

The probate court denied DFCU's petition for appointment of a special personal representative and granted petitioner's motion for a protective order. The probate court concluded that the decedent appeared to have been solvent when he died, but that his estate became insolvent by operation of the exempt property allowance, the funeral bill, and the costs of administration. Furthermore, the probate court found that DFCU had not identified any improper transfers and had not shown the decedent to have been insolvent when he issued any checks. DFCU appealed to the circuit court, which concluded that DFCU was improperly trying to pursue a fraudulent conveyance action, so the circuit court denied the application to appeal. This Court granted leave to appeal.

DFCU argues that the probate court abused its discretion granting petitioner's motion for a protective order. We disagree.

We review for an abuse of discretion a decision regarding a motion for a protective order to limit discovery. *PT Today, Inc v Comm'r of Office of Financial and Ins Services*, 270 Mich App 110, 151; 715 NW2d 398 (2006). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the permissible principled range of outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). This Court reviews a probate court's findings of fact for clear error. *In re Estate of Reisman*, 266 Mich App 522, 526 n 4; 702 NW2d 658 (2005). Interpretation of a court rule is a question of law that this Court reviews de novo. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003).

The probate court held that MCR 5.131(B) limited the scope of discovery because DFCU admitted that the purpose of discovery was to obtain information to pursue an action under the uniform fraudulent transfer act (UFTA), MCL 566.31 *et seq.*, in circuit court. Under MCL 566.35(1), a transfer by a debtor is fraudulent with respect to a creditor who had a claim before the transfer was made if the debtor made the transfer without receiving a reasonably equivalent value in exchange, and the debtor was insolvent at the time of the transfer or became insolvent as a result of the transfer. Under MCL 566.32(1), a debtor is insolvent if the sum of his debts is greater than the sum of his assets. MCL 566.31(b) defines "asset" as property of a debtor,

excluding the extent to which the property is encumbered by a valid lien. Property is “anything that may be the subject of ownership.” MCL 566.31(j). The UFTA defines “debt” as liability on a claim, and a “claim” is a right to payment. MCL 566.31(c), (e).

The decedent had a 401(k) account with a balance of approximately \$45,000. The 401(k) account was not part of the estate inventory, but it was the subject of ownership while the decedent was alive. The estate inventory listed the estate’s total assets as \$22,090.45, and at least some portion of the decedent’s \$100,000 annual salary likely constituted property under MCL 556.31(j). Depending on its terms, the decedent’s life insurance policy may also have constituted property for purposes of the UFTA. Accordingly, although the exact amount was not determined, the sum of the decedent’s assets was at least \$67,090.45. As noted, according to the schedule of distributions and payment of claims, the decedent’s claims amounted to a total of \$51,907.40. Therefore, although the exact balance of the decedent’s debts and assets at the time of the alleged transfers is unknown, the sum of his assets at the time of the transfers was greater than the sum of his debts. Although his *estate* was insolvent, decedent himself was not insolvent *while he was alive*. While we are mindful of the fact that the exact numbers and dates are not known, mere conjecture does not entitle DFCU to discovery. *Davis v Detroit*, 269 Mich App 376, 380; 711 NW2d 462 (2006). In general, Michigan’s public policy strongly supports broad and deep discovery, but this does not extend to permitting parties to engage in fishing expeditions. *Id.*; *In re Estate of Hammond*, 215 Mich App 379, 386-387; 547 NW2d 36 (1996).

DFCU points out that it specifically alleged fraudulent transfers in its objection to petitioner’s motion for a protective order. However, DFCU only identified approximately \$6,500 worth of payments that might have been fraudulent. Even if we were to presume that these payments were, in fact, not made in exchange for reasonably equivalent value, they still would not have made the decedent insolvent at the time they were made. MCL 566.35(1). We emphasize the point that the probate court made: the evidence shows that decedent’s *estate* became insolvent only by operation of debts incurred *after the decedent’s death*. Decedent was not insolvent during his lifetime. Therefore, DFCU had no grounds for pursuing discovery beyond what appears to be an impermissible fishing expedition, and the probate court did not abuse its discretion in granting petitioner a protective order.

DFCU also contends that the probate court abused its discretion in denying DFCU’s petition for the appointment of a special personal representative because a special personal representative is necessary for the unsecured creditors to recover assets that were fraudulently conveyed. We disagree. The appointment of a personal representative is within the trial court’s discretion. *In re Kramek Estate*, 268 Mich App 565, 575; 710 NW2d 753 (2005). And again, DFCU’s argument assumes that the decedent was insolvent when he made certain transfers. The personal representative has the exclusive right to recover property that has been “transferred by the decedent by any means that is in law void or voidable as against the decedent’s creditors, and subject to prior liens . . . so far as necessary for the payment of the decedent’s unsecured debts[.]” MCL 700.3710. DFCU claims that a special personal representative was necessary because petitioner refused to pursue recovery of any fraudulently transferred property. However, because the decedent was not insolvent when he made the alleged transfers, the UFTA is not implicated and a special personal representative was not needed to preserve the estate or to secure its proper administration. The probate court did not abuse its discretion in denying DFCU’s petition. MCL 700.3614(b).

We need not address DFCU's argument that remanding to a different judge is necessary.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Alton T. Davis

/s/ Deborah A. Servitto